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January 30, 2018

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Baker Street Associates LLC
 1080 Pittsford Victor Road
 Pittsford, NY 14534

Baker Street Landing, LLC
 7 Van Auker Street
 Rochester, NY 14608

MS Baker Street LLC
 1080 Pittsford Victor Road, Suite 100
 Pittsford, NY 14534

Mr. Scott Pruitt
 Administrator
 U.S. Environmental Protection Agency
 Mail Code 1101A
 1200 Pennsylvania Avenue, N.W.
 Washington, DC 20460

Mr. Peter D. Lopez
 Regional Administrator
 U.S. EPA Region 2
 290 Broadway
 New York, NY 10007-1866

Hon. Basil Seggos
 Commissioner
 N.Y.S. Department of Environmental
 Conservation
 625 Broadway, 14th Floor
 Albany, NY 12233-1550

Re: *Notice of Intent to Sue under Federal Water Pollution Control Act,*
33 USC § 1365

Dear Sir and/or Madam:

We represent Cynthia and Timothy Jessop, who own and reside at 60 Baker Street in Churchville, New York (Tel. (585) 737-1401). The Jessops' property is adjacent to the property previously owned by Baker Street Landing, LLC and currently owned by MS Baker Street LLC and Baker Street Associates, LLC (the "Defendants") at 30 Baker Street, Churchville, New York ("Defendants' Site"), which now contains an apartment complex known as Baker Street Landing.

On behalf of the Jessops, we hereby provide notice that Defendants are in violation of a permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to the Federal Water Pollution Control Act of 1973, as amended (the "Clean Water Act" or "CWA"). Therefore, pursuant to CWA § 505(a)(1) (33 USC § 1365(a)(1)), the Jessops may commence suit against one or more of the Defendants after sixty days from this notice to address the violations detailed below,

which include, without limitation, the failure to obtain coverage, or to comply with, the State Pollutant Discharge Elimination System ("SPDES") General Permit for Storage Discharges from Construction Activity (the "General Permit") issued by the New York State Department of Environmental Conservation ("DEC"), and continuing discharges of pollutants into waters of the United States without a permit, all in violation of CWA §§ 301 and 402 (33 USC §§ 1311, 1342).

A. The Affected Properties

The alleged violations began on or about April 21, 2017 and continue to the present, occurring on Defendants' Site and causing damage to the property the Jessops own at 60 Baker Street, Churchville, NY (the "Jessop Property").

Stormwater water at Defendants' Site drains to a pond that Defendants constructed. A drainage swale immediately north of the Jessop Property conveys stormwater from this pond through the Baker Street culvert to discharge the stormwater into a tributary of Black Creek. Sometime prior to April 21, 2017, the culvert became blocked and causing the water level in the pond to rise beyond its capacity and flood the Jessop Property. The culvert subsequently was cleared, but the Jessop's property has continued to experience repeated and severe flooding to the current day.

As detailed below, Defendants constructed the Baker Street Landing and discharged stormwater from its construction activities into waters of the United States without a permit and without implementing any stormwater or erosion control measures or ongoing maintenance practices for the pond it installed, causing stormwater to flood the Jessop Property and resulting in extensive damage. The Jessop Property has suffered significant flooding events, causing substantial damage to structures and personal property, as a result of Defendants' failures. For example, the barn structure in the rear of the Jessop Property, which is used for storage and as an office, suffered extensive water damage and it remains unclear whether the structure can be salvaged. In addition, numerous pieces of equipment and personal property were submerged for long periods of time and require expensive repairs or must be replaced altogether.

B. The Clean Water Act Framework and General Permit Requirements

Under the Clean Water Act, it is unlawful for any person to discharge any pollutant from a point source into navigable waters unless a permit is obtained in accordance with the provisions of that statute. See CWA §§ 301, 402 (33 USC §§ 1311, 1342). This means that a permit is required to discharge stormwater from construction activities into waters of the United States. See CWA § 402. Permits are issued under the National Pollutant Discharge Elimination System ("NPDES") by the United State Environmental Protection Agency ("EPA"), or by a State whose NPDES-permitting program EPA approves.

DEC issued the General Permit under its EPA-approved SPDES program. When construction activity will disturb more than one acre of land, the project must obtain coverage under the General Permit by submitting a Notice of Intent ("NOI") to DEC that provides information about the project. The project must thereafter comply with the requirements and conditions contained in the General Permit, which include, but are not limited to, the following:

- The owner or operator must select, design, install, implement, and maintain control measures to minimize the discharge of pollutants and prevent a violation of the water quality standards. Discharges authorized under the General Permit must achieve the effluent limitations set forth in Section 1.B.1.(a)-(f) of the permit. General Permit § I.B.1.
- The owner or operator must prepare and implement a Stormwater Pollution Prevention Plan ("SWPPP") that documents the selection, design, installation, implementation, and maintenance of the control measures and practices that will be used to meet the effluent limitations and (if applicable) post-construction stormwater management practices. The SWPPP must be submitted to DEC. General Permit § III.A.
- No more than 5 acres may be disturbed at one time without prior written approval from DEC (a "5-Acre Waiver"). This approval is obtained by submitting the SWPPP to DEC for its review and acceptance. General Permit § II.C.3.
- In areas where soil disturbance activity has temporarily or permanently ceased, soil stabilization measures must be initiated by the end of the next business day and completed within 14 days from the date the current soil disturbance activity ceased. General Permit § I.B.1.b.

Construction activities cannot commence until the owner's or operator's authorization to discharge under the General Permit goes into effect, which occurs only after several criteria are met, including preparation of the final SWPPP and submission of the completed NOI to DEC. General Permit § II.B.2.(c)-(d).

C. The Defendants' Unlawful Activities

DEC inspected the Defendants' Site on April 27, 2017 and May 10, 2017. As detailed in a letter from DEC dated June 5, 2017 (attached as **Exhibit A**), DEC confirmed that Defendants' Site was developed without obtaining the necessary coverage under the General Permit in violation of State law and the CWA.

Specifically, the prior owner of Defendants' Site, Excel Development, submitted an NOI to DEC in September 2008 and obtained coverage under the General Permit then in effect (GP-0-08-001) to construct the Baker Street Landing apartments. The NOI

indicated that the project would disturb 8.7 acres and would add approximately 2.9 acres of impervious surface area. However, Excel Development sold the property without developing it and terminated coverage under the General Permit in December 2009 by submitting a Notice of Termination ("NOT") to DEC.

Defendant Baker Street Landing, LLC eventually took over Defendants' Site and constructed the Baker Street Landing apartments. Construction commenced in November 2010 and concluded in 2012. However, no Defendant ever submitted an NOI or SWPPP to DEC to obtain coverage under the then-effective General Permit (GP-0-10-001). Coverage under, and compliance with, the General Permit is critical because it ensures proper design and construction of required stormwater management facilities like the pond installed at Defendants' Site. It also ensures a long-term operation and maintenance plan ("O&M Plan") is in place for stormwater management facilities and that a method is established to ensure the O&M Plan is followed (e.g. a deed covenant or as necessary deeding right-of-ways to the municipality). Defendants' failure to maintain its stormwater management facility lead to blockages in the Baker Street culvert and cause flooding to the Jessop Property as detailed above.

On the basis of the best information available to the Jessops, we believe that the activities described above violate the CWA in various respects including, but not limited to, the following:

1. Stormwater has flowed and continues to flow from Defendants' Site through a drainage swale that discharges to a tributary of Black Creek, and Defendants never obtained coverage under the General Permit for those discharges. Thus, Defendants have violated and continue to violate CWA §§ 301, 402 because the Defendants' discharges of stormwater from the construction activities were unpermitted.
2. Defendants have violated and continue to violate CWA § 402 by failing to file a NOI to be covered by the General Permit before construction on the Baker Street Landing apartments began on Defendants' Site.
3. Defendants have violated and continue to violate CWA § 402 and General Permit §§ III.A because no Defendant prepared or submitted a SWPPP to DEC before initiating construction activities on Defendants' Site including clearing, grading, and paving of the land; the addition of impervious surface areas; and construction of numerous buildings at the site.
4. No Defendant has signed a SWPPP for Defendants' Site in violation of General Permit § VII.H.2.
5. No SWPPP is in place nor were appropriate erosion or sediment controls used on Defendants' Site, allowing pollutants (including sediment) to collect in

stormwater runoff that discharges into the tributary of Black Creek. Neither were post-construction stormwater management practices implemented following construction of the pond on Defendants' Site. Accordingly, Defendants have violated and continue to violate:

- a. CWA §§ 301 and 302 and General Permit § I.B.1 by failing maintain effective erosion and sediment controls to minimize discharges of pollutants and to prevent violations of water quality standards;
 - b. General Permit § VII.E because such discharges have a reasonable likelihood to adversely affect human health or the environment;
 - c. General Permit §§ III.A.2 and III.B because there are no sediment and erosion control measures or post-construction stormwater management practices set forth in a SWPPP;
 - d. General Permit § IV.B.1 because Defendants failed to have a trained contractor inspect erosion and sediment control practices and pollution prevention measures within the active work area daily; and
 - e. General Permit § III.B.2.f because Defendants have no O&M Plan for Defendants' Site.
6. Because no Defendant ever prepared or implemented a SWPPP, they have not ensured that all work at Defendants' Site, including work by contractors or subcontractors and construction of the pond, complied with the New York State Standards and Specifications for Erosion and Sediment Control and the New York State Stormwater Management Design Manual (the "NYS Standards"). Nor have Defendants ensured that any soil stabilization measures conformed with the technical requirements of the NYS Standards. Therefore, Defendants violated and continue to violate General Permit §§ I.B.1, II.C.3.b, III.A.6, III.B.1.2 and VII.A.
7. Inspections were never completed to ensure that adequate erosion and sediment control practices were installed and operating. Accordingly, Defendants violated and continue to violate:
 - a. General Permit § IV.C.2 because Defendants failed to have a qualified inspector inspect the site at least once every 7 calendar days;
 - b. General Permit § IV.C.4 because no inspection reports have been prepared; and

- c. General Permit § II.C.2 because inspection reports were not maintained at Defendants' Site.
8. Construction of the Baker Street Landing apartments disturbed more than 5 acres of land, but no Defendant ever obtained a 5-Acre Waiver from DEC approving that disturbance in violation of General Permit § II.C.3.
9. Defendants violated and continue to violate General Permit § II.C.2 because Defendants failed to maintain at Defendants' Site a copy of the General Permit, the NOI, the NOI Acknowledgement Letter from DEC, a SWPPP, and all other documentation necessary to demonstrate eligibility with the General Permit until all disturbed areas have achieved final stabilization and a Notice of Termination of General Permit coverage is submitted to DEC.
10. All of the above described violations of the General Permit are likewise violations of Defendants' duty of compliance under General Permit § VII.A.

D. Conclusion

The Jessops may elect to commence a civil action sixty days from this notice, pursuant to CWA § 505 (33 USC § 1365), to prosecute these and other similar violations, including any and all violations which occur or continue to occur after service of this notice and all other violations revealed in the course of the litigation discovery process. The Jessops reserve the right to modify the descriptions of the circumstances described in this notice either upon the commencement of the civil actions or afterwards, depending on revelations that may occur in the course of the litigation discovery process.

If commenced, this suit would seek judicial relief enjoining Defendants from further discharging stormwater without the necessary protections and permit, ordering Defendants to pay fines and penalties up to \$52,414 for each day the violation continues and the Jessops' costs of litigation (including reasonable attorneys' fees and expert witness costs), in addition to abatement and an injunction to restore the affected properties to their pre-violation condition and to prevent future violations under the CWA and applicable law, including statutes and common law of New York State.

Sincerely,

BOND, SCHOENECK & KING, PLLC



Charles D. Grieco

Enclosures

January 30, 2018
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cc (via certified mail, return receipt requested):

Phillips Lytle LLP (Registered for NYS DOS Process)
28 E Main Street, Suite 1400
Rochester, NY 14614

United State Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Division of Water, Region 8
6274 East Avon-Lima Road, Avon, NY 14414-9516
P: (585) 226-5450 | F: (585) 226-9485
www.dec.ny.gov

June 5, 2017

Baker St. Associates LLC
1080 Pittsford Victor Rd.
Pittsford, NY 14534

Paul Robinson
Superintendent, Public Works
Village of Churchville
40 N. Main St.
Churchville, NY 14428

RE: Baker Street Landing Apartments – Stormwater Management
30 Baker St.
Churchville (V), Monroe County

Department staff conducted two site visits at Baker Street Landing Apartments in the Village of Churchville as referenced above on April 27, 2017 and May 10, 2017. The purpose of the site visits by the Department was to respond to drainage issues on a neighboring property. Excel Development obtained permit coverage under the Construction Stormwater General Permit for the Baker Street Landing Apartments in September of 2008. Excel Development terminated coverage under the General Permit in December of 2009 for this project as they sold the property without developing the site.

Construction of Baker Street Landing then commenced in November 2010 and concluded in 2012. Permit coverage under the Construction Stormwater General Permit was never obtained for construction at that time. Discharges of stormwater from any construction site that includes greater than one acre of soil disturbance require coverage under the General Permit. Therefore, as the original permit coverage was terminated as described above, prior to commencement of construction of Baker Street Landing Apartments, the new owner/operator at that time needed to obtain permit coverage.

Coverage under the Construction Stormwater General Permit ensures proper design of required stormwater management facilities, proper construction of stormwater management facilities, and the development of a long-term operation and maintenance plan for the stormwater management facilities. Finally, prior to closing out the Construction Stormwater permit with the Department, the owner/operator certifies that the long-term operation and maintenance plan has been developed in accordance with Department Standards and indicates the method used to ensure long-term operation and maintenance using one of the following options:

June 5, 2017

1. Post-construction stormwater management practice(s) and any right-of-way(s) needed to maintain practice(s) have been deeded to the municipality.
2. Executed maintenance agreement is in place with the municipality that will maintain the post-construction stormwater management practice(s).
3. For post-construction stormwater management practices that are privately owned, a mechanism is in place that requires operation and maintenance of the practice(s) in accordance with the operation and maintenance plan, such as a deed covenant in the owner or operator's deed of record.
4. For post-construction stormwater management practices that are owned by a public or private institution (e.g. school, university or hospital), government agency or authority, or public utility; policy and procedures are in place that ensures operation and maintenance of the practice(s) in accordance with the operation and maintenance plan.

During site visits made by the Department, it was observed that the drainage swale that conveys stormwater discharges away from the stormwater pond at Baker Street Landing had backed up and did not allow the pond to drain in the manner in which it was designed. This caused the level of the stormwater pond to rise, back up into the drainage area and discharge onto a neighboring property. The likely cause of the pond's discharge swale backing up was a blocked culvert under Baker St. that then conveys the swale under Baker St. and towards Black Creek. The lack of maintenance of stormwater management facilities will lead to these events.

As a long-term operation and maintenance plan was never developed under Construction Stormwater General Permit coverage and was never ensured and certified on a Notice of Termination with the Department, this process needs to be completed at this time. A long-term operation and maintenance plan needs to be developed in accordance with the NYS Stormwater Management Design Manual and be ensured using one of the options listed above.

Please make a written response by Friday July 7, 2017; indicate what method has been chosen to ensure long-term operation and maintenance of the stormwater management facilities and provide a copy of the long-term operation and maintenance plan. If you have any questions concerning this letter, please call or email me at (585)226-5427 or benjamin.groth@dec.ny.gov

Sincerely,



Benjamin Groth, P.E.
Assistant Engineer (Environmental)

Ecc: Kelly Emerick – Monroe County SWCD



Department of
Environmental
Conservation